UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: OFFSHORE AIR
FAA Order No. 2001-4

Docket No. CP98NM0025

Served: May 16, 2001

DECISION AND ORDER[1]

Respondent Offshore Air has appealed from the written initial decision issued by Administrative Law Judge Burton S. Kolko on November 9, 1999.[2] In his decision, the law judge held that Offshore Air had failed to receive verified negative pre-employment drug test results for two of its employees before they performed safety-sensitive functions for Offshore. The law judge also held that Offshore failed to conduct any random alcohol or drug testing for employees performing covered functions during calendar year 1996. Based on these findings, the law judge held that Offshore Air violated 14 C.F.R. §§ 135.251(a)[3] and 135.255(a)[4], 14 C.F.R. Part 121, Appendix I, § V paragraphs A.3[5] and

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[1] The Administrator's civil penalty decisions are available on LEXIS, Westlaw, and other computer databases. They can be found in Hawkins Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, *see* 66 Fed. Reg. 7532, 7549 (January 23, 2001).

[2] A copy of the law judge's decision is attached.

[3] Section 135.251(a), 14 C.F.R. § 135.251(a), of the Federal Aviation Regulations (FAR) provides "Each certificate holder or operator shall test each of its employees who performs a function listed in appendix I to part 121 of this chapter in accordance with that appendix."

C.6[6] and 14 C.F.R. Part 121, Appendix J, § III, paragraph C[7] (1996). Regarding sanction, the law judge held that under the particular circumstances of this case, a $10,000 civil penalty was appropriate.[8]

I. Regulatory Background – Drug Testing

Each Part 135 certificate holder or operator must conduct drug tests on its employees performing safety-sensitive functions, including employees performing flight crewmember and aircraft maintenance duties. 14 C.F.R. § 135.251, 14 C.F.R. Part 121,

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[4] Section 135.255(a) of the Federal Aviation Regulations, 14 C.F.R. § 135.255(a), provides, "Each certificate holder and operator must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to part 121 of this chapter."

[5] It is provided in Appendix I, § V, paragraph A.3 as follows:

> No employer shall allow an individual required to undergo pre-employment testing under section V, paragraphs A.1 or A.2 of this appendix to perform a safety-sensitive function unless the employer has received a verified negative drug test result for the individual.

14 C.F.R. Part 121, Appendix I, § V, paragraph A.3 (1996)

[6] Paragraph C.6 of Section V of Appendix I (pertaining to random drug testing) provides in pertinent part:

> The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Administrator.

14 C.F.R. Part 121, Appendix I, § V, paragraph C.6 (1996).

[7] Paragraph C.6. of Section III of Appendix J (pertaining to random alcohol testing) provides in pertinent part:

> The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum testing determined by the Administrator.

14 C.F.R. Part 121, Appendix J, § III, paragraph C.6 (1996).

[8] Complainant sought a $10,000 civil penalty in its amended complaint.

Appendix I, § III[9] (1996). Under the FAA's drug testing rules, an "employee" includes persons who work directly or by contract for an employer (*i.e.*, a Part 121 or Part 135 certificate holder)[10] and who perform safety-sensitive functions. 14 C.F.R. Part 121, Appendix I, § I (definition of employee) (1996).

A. Pre-employment Drug Testing. A Part 135 certificate holder may not allow an employee to perform safety-sensitive functions unless the certificate holder has received a verified negative drug test result for that individual. 14 C.F.R. Part 121, Appendix I, § V, paragraphs A.1[11] and 3 (1996).

B. Random Drug Testing. Under Section 135.251(a) and Part 121, Appendix I, § V., paragraph C, Part 135 certificate holders are required to perform random drug tests on their employees. In 1996, Part 135 certificate holders were required to conduct

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[9] Section III provides in pertinent part:

> III. *Employees Who Must Be Tested.* Each person who performs a safety-sensitive function directly or by contract for an employer must be tested pursuant to an FAA-approved antidrug program conducted in accordance with this appendix:
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> A. Flight crewmember duties.
>
> E. Aircraft maintenance or preventive maintenance.

14 C.F.R. Part 121, Appendix I § III (1996).

[10] *See* 14 C.F.R. Part 121, Appendix I, § II (1996) (definition of employer).

[11] It is provided as follows:

> Prior to the first time an individual performs a safety-sensitive function for an employer, the employer shall require the individual to undergo testing for prohibited drug use.

14 C.F.R. Part 121, Appendix I, § V, paragraph A.1 (1996).

random drug testing on no fewer than 25% of their employees who performed safety-sensitive functions. 60 Fed. Reg. 65476 (December 19, 1995).[12]

II. Regulatory Background – Alcohol Testing

Each Part 135 certificate holder or operator must establish an alcohol misuse program in accordance with 14 C.F.R. Part 121, Appendix J. 14 C.F.R. § 135.255(a). Part 135 certificate holders or operators shall not use any "covered employee" to perform safety-sensitive functions unless that person is subject to alcohol misuse testing. 14 C.F.R. § 135.255(b). Covered employees are persons who either directly or by contract perform safety sensitive duties, including flight crewmember, aircraft maintenance, and preventive maintenance duties, for an employer. 14 C.F.R. Part 121, Appendix J, Section II (1) and (5).

Employers are required to implement several types of testing programs, including random alcohol testing of covered employees. The annualized testing rate for random alcohol misuse testing in 1996 was 25%. (Tr. 53-56.)

III. The Case

On June 14, 1996, the FAA issued an air carrier certificate to Offshore Air. (Complainant's Exhibit 1.)[13] Offshore is located in Eastsound, Washington. (Tr. 18.) As part of the application process, in April 1996, Offshore's Director of Flight Operations,

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[12] *See* 14 C.F.R. Part 121, Appendix I, § V, paragraph C.1-4, pertaining to the Administrator's determination of whether operators and certificate holders subject to the drug testing rules must conduct random drug testing on 25% or 50% of their employees performing safety-sensitive functions.

[13] It was reissued to Joseph R. Haley on March 3, 1997. (Complainant's Exhibit 2.)

Joseph Haley,[14] submitted an anti-drug plan/alcohol abuse prevention program certification statement to the FAA. (Complainant's Exhibit 11.) In this statement, Offshore indicated that it had a total of four safety-sensitive employees: three flight crewmembers and one aircraft maintenance employee. (*Id.*)

On February 12, 1997, Connie Holle, an Aviation Drug Abatement Program Inspector for the FAA,[15] conducted an inspection of Offshore's anti-drug and alcohol misuse prevention programs. (Tr. 15, 18, 19.) This investigation subsequently resulted in this civil penalty action, as well as a separate administrative action.[16]

A hearing was held before Administrative Law Judge Kolko on June 25, 1999. Inspector Holle's testimony was based on her inspection of Offshore's maintenance logs, her interview with Mr. Haley, and her examination of other records. She testified that Robin Watson performed maintenance on one of Offshore's aircraft on June 23 and July 23, 1996 (Tr. 34-35, 38; Complainant's Exhibit 6), even though Offshore Air did not administer a pre-employment drug test to Mr. Watson until August 29, 1996.[17] (Tr. 37; Complainant's Exhibit 7.) Mr. Watson was doing business as Island Aeroplane Works.[18]

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[14] Mr. Haley is also Offshore's owner, chief pilot, and anti-drug program manager.

[15] She was accompanied by another inspector, Lawrence Anderson. (Tr. 19.)

[16] As will be explained in greater detail later in this decision, *see* pages 19-20 *infra*, Inspector Holle issued a letter of correction for the less egregious discrepancies uncovered during the inspection. In addition, she issued a letter of investigation regarding the more serious discrepancies. This civil penalty action followed from the letter of investigation. (Tr. 20-22.)

[17] Subsequently, Mr. Watson's drug test came back negative. (Tr. 37; Complainant's Exhibit 7.)

[18] Complainant alleged as follows: On or about June 23, 1996, Robin G. Watson d/b/a Island Aeroplane Works ... performed safety-sensitive duties for Offshore Air by contract, in that he performed aircraft maintenance or preventative maintenance duties." Amended Complaint at 2. Inspector Holle testified on cross-examination that Mr. Watson's company could fall under the definition of a contractor company, *i.e.*, a company that has employees who perform safety-sensitive functions by contract for an employer. (Tr. 102-103.)

Inspector Holle testified that even if Mr. Watson had a company of his own, he would be considered as an employee under the drug testing regulations because the regulatory definition of "employee" includes those persons who perform, "either directly or by contract" safety-sensitive functions for an employer. (Tr. 36.)

In addition, Inspector Holle testified that her inspection of the flight logs revealed that another Offshore employee, Francis Cantwell, performed safety-sensitive functions for Offshore before Offshore received a verified negative drug test result for him. The inspector explained that Mr. Cantwell had served as a pilot on a number of Offshore flights on November 2, 8, 9, 11, 18 and 20 and on December 13, 14, 24 and 31, 1996. (Tr. 41-43; Complainant's Exhibit 8.) She explained, based upon her interview with Mr. Haley and her examination of Offshore's records, that Offshore did not administer a drug test to Mr. Cantwell until January 14, 1997, and did not receive the results until after that date. (Tr. 47.)[19]

Regarding random drug and alcohol testing, Inspector Holle testified that in calendar year 1996, Offshore was required to perform one random drug test and one random alcohol test in light of the fact that it had four covered employees.[20] (Tr. 61.) Random testing, she explained, must be performed at the annualized rate during a calendar year, as opposed to during a 12-month period. (Tr. 59, 96-98.) However, she testified, Offshore did not perform any random drug or alcohol tests in calendar year 1996. (Tr. 57-58; 61.) Hence, she testified, Offshore had violated 14 C.F.R. §§ 135.251 and 135.255, as well as 14 C.F.R. Part 121, Appendices I and J. (Tr. 58, 62.)

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[19] The test results came back negative. (Tr. 46; Complainant's Exhibit 10.)

[20] Inspector Holle testified that during the inspection, Mr. Haley informed her that Offshore had four covered employees. (Tr. 106-7.)

Mr. Haley took issue with Inspector Holle's explanation that random testing of employees must be accomplished within a calendar year, rather than in the 12-month period following the implementation of the anti-drug program. He testified that in 1996 he received a copy of a June 1990 FAA document with answers to frequently asked questions about the aviation industry anti-drug program.[21] The definition of calendar year contained in that document is as follows:

> Q: What is meant by "calendar year" in the FAA drug rule?
>
> A: For purposes of the FAA anti-Drug Rule – "calendar year" begins on the date your plan is implemented and continues for 365 consecutive days.

Respondent's Exhibit 3, Most Frequently Asked Questions About the Aviation Industry Anti-Drug Program, ("FAQs"), page 3, revision dated June 1990. Based on that guidance, Offshore would have had at least until June 1997,[22] rather than until December 31, 1996, as alleged by Complainant, to complete random drug testing on 25% of its employees performing safety-sensitive functions. Inspector Holle, however, explained that the guidance provided in the June 1990 FAQs brochure was "obsolete." (Tr. 136.)

The law judge sustained the agency attorney's objection regarding the 1990 FAQs. According to the law judge, to the extent that the 1990 FAQs provided guidance

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[21] Mr. Haley testified on direct that he received the FAQs brochure from the FAA in November 1998, long after the initiation of this civil penalty action. (Tr. 143.) Only on cross-examination did he claim to have received the FAQs brochure from Inspector Holle prior to the inception of his operations. (Tr. 164-165.) The law judge nonetheless held that it was possible that Mr. Haley reasonably relied upon the outdated advice in the FAQs to his detriment when he implemented the anti-drug program. (Initial Decision at 9-10.)

[22] Offshore received its air carrier certificate in June 1996.

that was different from the regulations in effect at the time of the events in this case, the more recent regulations took precedence over the advisory circular. (Tr. 101.)

Inspector Holle testified that she remembered giving Mr. Haley a plan submission packet, including the current regulations, in the spring of 1996. (Tr. 65-66, 118.) However, she did not recall whether the June 1990 FAQs brochure was in that package. (Tr. 117.) She testified that she recalls personally handing Mr. Haley the excerpt of the current Federal Aviation Regulations requiring Offshore to perform random alcohol and drug testing and pre-employment drug testing. (Tr. 118, 137-138.)

Mr. Haley testified that Mr. Watson was a contractor, and therefore, based on the guidance contained in the 1990 FAQs brochure, Offshore had 365 days to give him a pre-employment drug test.[23] (Tr. 159.) Inspector Holle explained that indeed, initially the FAA's drug rules provided for staggered implementation with regard to contractor employees. (Tr. 122-124.) However, she further explained, the current requirement was otherwise, and that here too the June 1990 guidance was outdated. (Tr. 123-124.)

IV. The Law Judge's Decision

The law judge held, based largely on the testimony of Inspector Holle, which he found to be "credible and generally unrefuted," that Complainant proved the alleged violations. (Initial Decision at 3.)

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[23] It appears that Mr. Haley misspoke, and that he probably meant to say "360 days" in which to administer the pre-employment drug test to Mr. Watson. The 1990 FAQs provided:

> It is the air carrier or operator's responsibility to ensure that any contractor employee performing a covered function is included in the FAA approved drug program within 360 days from the time the operator implements a program for its direct employees.

(Respondent's Exhibit 3 at 9.)

Pre-employment Drug Abuse Testing. Specifically, the law judge held that Mr. Watson performed maintenance, a safety-sensitive function, for Offshore on June 23 and July 23, 1996, but did not undergo drug testing until August 29, 1996. He concluded that this was a violation of Section 135.251(a) and Part 121, Appendix I, § V, paragraph A.3, requiring that employers receive verified negative drug-test results for employees prior to employment. (Initial Decision at 3-4.) The law judge held that if it is true that Mr. Watson was a contract employee, rather than an Offshore employee, Offshore was still obligated to comply with the drug testing regulations. (Initial Decision at 4.) As the law judge explained, "[i]ndividuals in the employ of other entities who perform covered functions by contract with Part 135 air carriers such as Offshore are specifically included in drug-testing requirements ...."[24] (Initial Decision at 4.)

The law judge held that Mr. Cantwell also performed safety-sensitive functions for Offshore prior to the administration of the pre-employment drug test, and as a result, before receiving the verified negative test results for Mr. Cantwell. Hence, the law judge held, Offshore violated Part 121, Appendix I, § V, paragraph A.3, and Section 135.251(a).

Random Drug and Alcohol Testing. The law judge held that in 1996, the FAA required Part 135 certificate holders to accomplish random drug testing on 25% of their employees. Because Offshore had four covered employees, the law judge held, Offshore was obligated to conduct one random drug test during calendar year 1996. (Initial Decision at 5.) However, Offshore did not conduct any random drug tests on any of the employees included in its anti-drug program during calendar year 1996, and as a result,

[24] Referring to Part 121, Appendix I, definition of "employee."

the law judge held that Offshore violated Part 121, Appendix § V, paragraph C and Section 135.251. (Initial Decision at 5.) Likewise, the law judge held that Offshore was required to complete random alcohol testing on 25% of its four covered employees during calendar year 1996, but that it failed to conduct any such random tests. Hence, the law judge held, Offshore violated Part 121, Appendix J, § III, paragraph C and Section 135.255(a). (Initial Decision at 5.)

The law judge rejected Offshore's argument that it should be absolved from any liability for failing to accomplish random drug testing on 25% of its covered employees prior to the end of calendar year 1996 because it had relied upon contrary guidance contained in the 1990 FAQs brochure. The law judge explained that "[i]t is a well-established legal principle that a regulation has the force of law and a guideline does not." (Initial Decision at 6.) Also, he noted, the 1990 FAQs brochure had been superceded by the issuance of the regulations in 1996. Thus, the regulation that provided for the completion of random testing during the calendar year was controlling. (Initial Decision at 6.)

Civil Penalty. The law judge assessed a $10,000 civil penalty,[25] finding specifically that each of the four violations warranted a civil penalty of $2,500. The law judge held that these violations were a "serious matter" and that Mr. Haley either knew or should have suspected that pre-employment testing was necessary before Mr. Watson and Mr. Cantwell could perform safety-sensitive functions for Offshore. (Initial Decision at 9.) The law judge balanced against those factors Offshore's small size and the possibility

[25] Complainant sought a $10,000 civil penalty in its complaint. (Amended Complaint at 4.)

that Mr. Haley was misled by the guidance in the 1990 FAQs brochure.[26] The law judge stated that Mr. Haley's "assertion that he had trusted the information in it is an entirely credible and sensible reaction." (Initial Decision at 9-10.)

V. Discussion[27]

1. In this appeal, Offshore argues, relying upon the guidance contained in the 1990 FAQs brochure, that Robin G. Watson and Francis X. Cantwell were contractor companies, and as a result, Offshore was not required to conduct any drug tests on them for 360 days after the inception of Offshore's operations. (Appeal Brief at 2-3.) Offshore's argument is rejected.

The 1990 FAQs brochure provided the following guidance regarding contractor employees: "It is the air carrier or operator's responsibility to ensure that any contractor employee performing covered functions is included in an FAA-approved drug program within 360 days from the time the operator implements a program for its direct employees." (Respondent's Exhibit 3 at 9.) This guidance was consistent with the pertinent regulations in existence at the time.[28] However, in August 1994, when the FAA

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[26] The law judge wrote: "However, the possibility that Haley was misled by the 1990 guidelines, while without legal significance, is troubling from an equitable perspective. A lay person handed a government-issued document cannot reasonably be expected to independently determine that some of the advice contained therein is not valid; in fact, it seems more likely that the reader of such document would trust implicitly statements issued under the government imprimatur (see Tr. 150.)" (Initial Decision at 9.)

[27] Any arguments made by Offshore that are not addressed specifically in this decision have been considered and found to be unpersuasive.

[28] The FAA set forth the schedule for drug testing plans in Appendix I to 14 C.F.R. Part 121 (1990). The FAA provided that an employer who holds a Part 135 certificate and employs 10 or fewer employees performing safety-sensitive functions "shall implement the employer's or operator's approved anti-drug program for its contractor employees not later than 360 days after initial implementation of the employer's or operator's approved anti-drug program for its direct

amended the drug testing rules, it eliminated the "substantial grace period" provided in the 1990 regulations. 59 Fed. Reg. 42922, 42926 (August 19, 1994).[29] As amended, the drug testing rules required that the contractor employees of any person who applied for a Part 135 certificate after September 19, 1994, must be subject to an FAA-approved anti-drug program within 60 days of the implementation of the employer's program. Applicants were required under the amended rules to implement the approved anti-drug program not later than the date of inception of operations. 59 Fed. Reg. 42,922, 42,932 (August 19, 1994); 14 C.F.R. Part 121, Appendix I, § IX paragraph 2(a) (1995). The requirement that contractor employees be subject to a new operator's anti-drug program within 60 days of the implementation date of the employer's program remained in effect in 1996, when the events in this case took place.[30]

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employees." 14 C.F.R. Part 121, Appendix I, § IX, paragraph A.4 (1990). (*See* 14 C.F.R. Part 121, Appendix I, § IX paragraph A.2-3 (1990) for the similar implementation requirements pertaining to larger Part 135 operators.)

[29] The FAA explained in the preamble to the amendments:

> Second, the "transition" provisions of the rule for new aviation employers (paragraph A section IX) have been changed to eliminate the substantial grace period previously provided. Commenters supported the FAA's view that given the published guidance available from the FAA and from private sector entities and the wealth of material and experience now available, there is no longer a reason to permit carriers to begin operations without having implemented an FAA-approved antidrug program.

59 Fed. Reg. 42922, 42926 (August 19, 1994).

[30] The pertinent provision of Part 121 provided:

> 2(a). Any person who applies for a certificate under the provisions of part 121 or part 135 of this chapter after September 19, 1994 shall submit an antidrug program plan to the FAA for approval and must obtain such approval prior to beginning operations under the certificate. The program shall be implemented not later than the date of inception of operations. Contractor employees to a new certificate holder must be subject to an FAA-approved antidrug program within 60 days of the implementation of the employer's program.

14 C.F.R. Part 121, Appendix I § IX, paragraph A.2(a)(1996).

Offshore was required to implement its anti-drug program on the same date as it began operations, and it was required to implement that program for its contractor employees not later than 60 days afterwards. The FAA issued a Part 135 certificate to Offshore on June 14, 1996, and Robin Watson did work for Offshore on June 23 and July 23, 1996. Complainant alleged in its amended complaint that Mr. Watson, d/b/a Island Aeroplane Works, performed safety-sensitive duties for Offshore by contract. (Amended Complaint, Section I, paragraph 9.) Thus, Mr. Watson performed services for Offshore during the 60-day period during which Offshore was *not yet* required to subject its contractor employees to the anti-drug program. As a result, Complainant has not proven that Offshore violated the requirements of 14 C.F.R. § 135.251, 14 C.F.R. Part 121, Appendix I, §§ V.A.1 and 3 (1996) regarding the safety functions performed by Mr. Watson on June 23 and July 23, 1996.

In its reply brief, Complainant argues that under 14 C.F.R. Part 121, Appendix. I, § III, "Each person who performs a safety-sensitive function directly or by contract for an employer must be tested pursuant to an FAA-approved antidrug program conducted in accordance with this appendix." Complainant argues that in light of this requirement, Offshore should have received the verified negative drug test for Mr. Watson prior to using him to perform safety-sensitive functions. Complainant, however, made no attempt to reconcile that provision with the 60-day grace period from the inception of operations during which a new certificate holder is not required to subject its contractor employees to its FAA drug testing program.[31]

[31] The 60-day grace period in effect when the violation occurred was not brought to the law judge's attention and thus, he did not have this information when he rendered his initial decision.

The law judge assessed a $2,500 civil penalty for the violation that he found involving Mr. Watson's performance of safety-sensitive functions prior to receiving a drug test. In light of the reversal of the law judge's finding of violation involving Offshore's use of Mr. Watson to perform safety-sensitive functions without having received verified negative drug test results, the civil penalty assessed by the law judge will be lowered accordingly.

2. As to Mr. Cantwell, Offshore contends for the first time during these proceedings that Francis Cantwell was employed as a teacher and only worked for Offshore part-time as a contractor company, not as an employee.[32] (*See* Appeal Brief at 2.) The record contains no evidence to substantiate this new contention. Regardless, whether Mr. Cantwell flew as a pilot for Offshore as a direct employee or as a contractor company, Offshore should have received a verified negative drug test result before allowing Mr. Cantwell to make those flights. Mr. Cantwell flew for Offshore in November and December 1996, long after the 60-day period following the inception of Offshore's operations had expired, and the drug test was not conducted until January 1997. Thus, Offshore violated 14 C.F.R. § 135.251(a) and 14 C.F.R. Part 121, Appendix I, § V, paragraphs A.1 and 3 (1996).

3. Offshore also argues that the law judge erred when determining that Offshore was required to complete random testing of 25% of its covered employees during calendar year 1996, not, as Offshore argued, within 365 days following the inception of

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[32] No mention was made at the hearing about Mr. Cantwell being a teacher. Instead, at the hearing, Offshore took the position that it was in substantial compliance with the drug testing rules because Mr. Cantwell had been covered by the drug and alcohol programs of his former employer, United Express/Atlantic Coast Airlines. (Tr. 159, 176-179; Complainant's Exhibits 9 and 15.) In his initial decision, the law judge rejected that argument, finding that Mr. Cantwell's

its anti-drug program. In making this argument, Offshore again relies upon the 1990 FAQs brochure. (Appeal Brief at 3.) The brochure contained the following explanation of the term "calendar year": "For purposes of the FAA Anti-Drug rule – 'calendar year' begins on the date your plan is implemented and continues for 365 consecutive days." (Respondent's Exhibit 3 at 3.)

The above-quoted guidance provided in the 1990 FAQs brochure was consistent with the requirements set forth in Appendix I to Part 121 pertaining to random drug testing in 1990. At that time, the term "annualized rate" for purposes of random drug testing was defined as "the percentage of specimen collection and testing of employees performing a function listed in section III of this appendix during a calendar year." 14 C.F.R. Part 121, Appendix I, § II (definition of annualized rate)(1990). In explaining how the random drug testing requirements were to be implemented, the FAA provided in pertinent part as follows:

> (1) During the first 12 months following implementation of unannounced testing based on random selection pursuant to this appendix, an employer shall meet the following conditions:
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> (a) The unannounced testing based on random selection of employees shall be spread reasonably throughout the 12-month period. ...
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> (c) The total number of unannounced tests based on random selection during the 12-months shall be equal to not less than 25 percent of the employees performing a function listed in section III of this appendix.
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> (2) Following the first 12 months, an employer shall achieve and maintain an annualized rate equal to not less than 50 percent of employees performing a function listed in section III of this appendix.

14 C.F.R. Part 121, Appendix I, § V, paragraph C(1)(a), (1)(c), and (2) (1990).

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employment with United Express/Atlantic Coast Airlines had ended in August 1994, more than 2 years before Mr. Cantwell flew for Offshore. (Initial Decision at 4.)

On December 22, 1994, the above provisions permitting the employer to accomplish random testing during the first 12 months following implementation of its anti-drug program were eliminated and superceded by the following provision:

> (6) The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual percentage rate for random drug testing determined by the Administrator.

59 Fed. Reg. 62218, 62226 (December 2, 1994) (*amending* 14 C.F.R. Part 121, Appendix I, § V, paragraph C). Thus, the guidance contained in the 1990 brochure was no longer current in 1996 because it did not reflect the regulatory provisions issued on December 22, 1994. (*See* 14 C.F.R. Part 121, Appendix I § V, paragraph C.6 (1996)).

Offshore argued that the guidance set forth in the 1990 FAQs brochure was not obsolete, and that the date of the brochure "is insignificant, as it [the brochure] simply clarifies the language of the regulations." (Appeal Brief at 6.) As seen above, however, the regulatory provisions upon which the 1990 FAQs brochure was based were superceded by regulatory amendment in 1994, and as a result, the brochure's guidance was outdated. The portions of the brochure upon which Offshore relies in its argument may have clarified the rules as they existed in 1990, but not those in effect when Mr. Cantwell and Mr. Watson performed their duties for Offshore in 1996.

Offshore was required to comply with the then current regulations, which in this case were set forth in Part 121, Appendix I (1996). As the law judge correctly explained in his initial decision:

> It is a well-established legal principle that a regulation has the force of law and a guideline does not. As such – and as I ruled at the hearing – a regulation always trumps a guideline (Tr. 101, 124-25; *see, e.g., Lauer v. Apfel*, 169 F.3d 489, 492 (7 Cir. 1999)). Offshore, therefore, was required to apply the calendar-year basis set out by the appendices for establishing the random testing programs. This conclusion is also supported by the fact that the regulations were issued six

> years after the pamphlet (1996 as opposed to 1990). In case of conflict the latest statement of rules generally controls, and the latest statement established the calendar-year basis for regulatory compliance.

(Initial Decision at 6.)

The law judge apparently credited Mr. Haley's testimony that the FAA had provided him with a copy of the 1990 FAQs brochure prior to the inception of Offshore's operations, and held that "Haley was not at all unreasonable in believing what he had seen in the 1990 pamphlet." (Initial Decision at 9-10.) Such reliance upon misinformation, if indeed the FAA did mistakenly provide the outdated brochure to Mr. Haley and if Mr. Haley did rely upon it, did not estop the FAA from bringing this civil penalty action against Offshore. "[A]s a general rule, 'those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law.'" Emery Mining Corporation, v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984), *citing* Heckler v. Community Health Services, 467 U.S. 51 (1984). A Part 135 operator must be held responsible for knowing and complying with the safety standards set forth in the Federal Aviation Regulations, regardless of any mistaken guidance provided by a FAA office that did not have the authority to change the regulatory requirements.[33] There is no evidence to prove that the

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[33] In Emery Mining Corp. v. Secretary of Labor, the court explained:

> Whatever their position within the agency, the MSHA [Mine Safety and Health Administration] officials who approved Emery's plan clearly had no authority to waive the Act's requirements and bind the government to what amounts to an amendment of the statutory language. Particularly where mandatory safety standards are concerned, a mine operator must be charged with knowledge of the Act's provisions and has a duty to comply with those provisions. To the extent Emery relied on an interpretation by MSHA officials of the Act's implementing regulations, Emery assumed the risk that that interpretation was in error.

Emery v. Secretary of Labor, 744 F.2d at 1416.

provision of the outdated brochure – if it actually was provided to Mr. Haley in 1996 – should be regarded as affirmative government misconduct equitably estopping the FAA from holding Offshore responsible for violating the drug testing regulations.[34] Also, Inspector Holle recalled handing Mr. Haley the regulations that were in effect at the time that his new company started its operations.

4. The law judge explained that the possibility that Offshore was misled by the outdated brochure constituted a mitigating factor with regard to the assessment of a penalty for the violations. (Initial Decision at 9-10.) The law judge explained that the maximum civil penalty for a small company, like Offshore, under the Enforcement Sanction Guidance Table, is in the range of $4,000 to $10,000 per violation. In consideration of the possibility that Offshore may have been misled, as well as Offshore's small size, the law judge assessed a $10,000 civil penalty for Offshore's multiple violations. It was appropriate for the law judge to regard the possibility that Offshore relied upon outdated guidance provided by the FAA as a mitigating factor in determining the appropriate penalty.

5. In his initial decision, the law judge held that "the inconsistencies contained in the exchange of letters [between Inspector Holle and Mr. Haley prior to the issuance of the notice of proposed civil penalty] do not absolve Offshore of the charges in this proceeding." (Initial Decision at 8.) Offshore, on appeal, argues that Inspector Holle, in

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[34] The negligent provision of incorrect information does not constitute affirmative misconduct that will equitably estop the Government from proceeding against someone who fails to comply with Federal requirements. Socop-Gonzalez v. INS, 208 F.3d 838, 842 (9th Cir. 2000.) There is no evidence to indicate in this case that if indeed a FAA employee gave Mr. Haley the outdated brochure, that action was anything but an act of negligence.

a letter dated May 5, 1997, closed the entire inspection, and that a reasonable person, receiving that letter, would, as he did, assume that the FAA was closing the entire matter.

Inspector Holle opened two different case files pertaining to her findings during the inspection. Inspector Holle and Mr. Haley exchanged numerous letters pertaining to these two different cases.

Case File No. 97NM910072 was an administrative action known as a letter of correction.[35] Inspector Holle issued the letter of correction in Case File No. 97NM910072 on February 21, 1997. In that letter, Inspector Holle summarized Offshore's agreements to correct approximately 20 discrepancies. Inspector Holle wrote that legal enforcement action[36] was not necessary for the discrepancies specified in the letter. (*Id.*, at 4.)[37] In other words, Inspector Holle did not contemplate taking a civil penalty, certificate suspension or certificate revocation action for these discrepancies.

On March 6, 1997, Inspector Holle issued a letter of investigation, a preliminary step often leading to a legal enforcement action (civil penalty or certificate action) in Case File No. 97NM910073, to Offshore. The letter of investigation pertained to the more serious discrepancies found during the same inspection.[38] Inspector Holle noted in the letter of investigation that the agency was investigating discrepancies involving Offshore's use of Robin Watson and Francis Cantwell to perform covered functions prior to receiving verified negative pre-employment test results for them. Inspector Holle also

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[35] The criteria for letters of correction are set forth in FAA Order No. 2150.3A, paragraph 205.

[36] *I.e.*, certificate or civil penalty action.

[37] Mr. Haley received this letter of correction by certified mail on February 25, 1997. (Complainant's Exhibit 3A at 5.)

[38] *See* Tr. 22-23.

noted in the letter of investigation that Offshore Air failed to conduct random drug and alcohol testing at an annual rate not less than 25 percent of the employees performing covered functions for the year 1996. (Complainant's Exhibit 3.) The letter of correction and the letter of investigation did not contain any overlapping discrepancies, although both dealt with drug and alcohol testing program discrepancies.

Offshore responded to the letter of investigation on March 10, 1997. (Complainant's Exhibit 4.) In the response, Mr. Haley mistakenly referenced Case File No. 97NM910072, the file for the letter of correction, rather than Case File No. 97NM910073, the file for the letter of investigation.

Inspector Holle wrote to Mr. Haley on May 5, 1997, pertaining to the administrative action, Case File No. 97NM910072. Inspector Holle mistakenly referred to Mr. Haley's letter dated March 10th (which had been in response to the letter of correction, not the letter of investigation.) Inspector Holle concluded her letter as follows: "**In closing this inspection regarding those items addressed in the letter of correction**, we have given consideration to all available facts and concluded that the matter does not warrant legal enforcement action." (Respondent's Exhibit 1, emphasis in the original.)

The law judge rejected Offshore's contentions that Inspector Holle's May 5th letter closed the entire investigation, or that it had the right to conclude from that letter that the entire investigation was closed. (Initial Decision at 8.)

On appeal, Offshore complains that if Inspector Holle did not intend to close the entire investigation – both the letter of correction and the letter of investigation -- then Offshore was denied the "right to further recourse on the local level prior to being subject

to the complaint from Mr. Hernandez."[39] (Appeal Brief at 8.) Complainant replied in its reply brief that the mistake in Inspector Holle's May 5th letter was minor and that the letter was otherwise clear in that it correctly referenced the EIR[40] number for the less serious violations and noted that the letter's purpose was to "clos[e] this inspection regarding those items addressed in the [February 21, 1997] letter of correction." (Reply Brief at 14.)

Although the letters of correction and investigation and the correspondence following them may have seemed clear to agency counsel, who is familiar with such letters and their terminology, it is easy to understand how Mr. Haley could have been confused by them. Inspector Holle's mistaken reference to Mr. Haley's March 10th letter may have added to the confusion. The letters of correction and investigation had no titles which might have made the distinction between them clearer. The case file numbers were very similar.

Nonetheless, the law judge correctly held that any confusion resulting from the exchange of letters did not mean that Complainant could not pursue the civil penalty action. As the law judge found, Mr. Haley could have contacted Inspector Holle and requested that she clarify the distinction between the letters of correction and investigation and could have inquired whether she intended in the May 5, 1997, letter to close both actions. Furthermore, if Mr. Haley did believe that both actions had been

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[39] Mr. Hernandez was the agency attorney assigned to this matter during the hearing stage of the proceedings.

[40] EIR stands for Enforcement Investigative Report.

closed, he must have recognized that at least the allegations that led to this case remained open when he received the notice of proposed civil penalty in January 1998.[41]

More importantly at this stage of the proceedings, if indeed Mr. Haley was confused by the correspondence from Inspector Holle, he has not shown that that confusion led to any prejudice. Offshore has not argued, for example, that it failed to preserve evidence or to present all of its arguments to Inspector Holle or later to agency counsel. Once the notice of proposed civil penalty was issued, Offshore had the opportunity for an informal conference with the agency counsel and to present additional information that it may have regarded as either exonerating or mitigating. For this reason, any flaws in the correspondence did not preclude Complainant from continuing with the civil penalty action.

6. Offshore argues that this case should never have gone to hearing because the parties had reached a settlement prior to the hearing and that agency counsel subsequently reneged on the settlement. (Appeal Brief at 11.)[42] Complainant replies that the settlement discussions between the parties are irrelevant, and that the agency counsel was justified in withdrawing the settlement offer. (Reply Brief at 15-16).

Preliminarily, it is not the Administrator's role to decide whether the agency attorney *should* have settled this case with Offshore. The decision whether to settle a proposed civil penalty action and, if so, on what terms, is within the sole discretion of

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[41] In addition, Mr. Haley shares some responsibility for any confusion arising from Inspector Holle's May 5 1997, letter, because he had mistakenly referenced Case File No. 97NM910072, the letter of correction, in his reply to the letter of investigation, Case File No. 97NM910073.

[42] Offshore made this argument at the hearing as well. (*E.g.*, Tr. 6, 14, 153.) The law judge did not specifically address this argument in his initial decision. However, the law judge did write that he rejected all arguments advanced by Offshore that he did not address specifically in his decision. (Initial Decision at 10.)

agency attorneys.[43] The question presented here is only whether a binding settlement had been reached.

It appears from the evidence that a binding settlement agreement was not reached, despite Offshore's protests to the contrary. The evidence indicates that Mr. Hernandez, the agency attorney, offered to settle the case for $1,000, if Offshore could provide documentation substantiating that Mr. Cantwell was covered under another employer's drug and alcohol programs when he performed safety-sensitive functions for Offshore. Mr. Haley did provide documents, but Mr. Hernandez did not consider the documentation to be probative. (Tr. 174-175.) Consequently, Mr. Hernandez withdrew the offer. Complainant's offer had been a contingent one, and Offshore's response, according to the agency attorney, was not satisfactory. Hence, while an offer was made, an actual settlement agreement was not reached.[44]

[43] *See* definition of the term "agency attorney" set forth at 14 C.F.R. § 13.202, which explains that the Administrator is not included in those agency officials who prosecute a civil penalty case under 14 C.F.R. Part 13, subpart G.

[44] This conclusion is not contradicted by the letter written to Mr. Haley by Mr. Hernandez and sent by FAX on September 30, 1998. (*See* Attachment 6 to Respondent's appeal brief.) In that letter, Mr. Hernandez wrote that the Federal Aviation Administration was "prepared to settle" ... for $1,000, in view of Offshore Air's size and the facts you presented during the July 7, 1998, informal conference." While this letter might have been more clearly written regarding the contingencies that Mr. Hernandez apparently had explained during a previous telephone conversation, the letter constitutes only a settlement offer. It does not constitute a settlement agreement, in which both parties spelled out their agreement on a finding of violations, if any, a civil penalty, if any, and a withdrawal of any of the initiating documents, if appropriate.

VI. Conclusion

THEREFORE, in light of the foregoing, Offshore's appeal is denied for the most part but granted regarding the Offshore's failure to conduct pre-employment drug testing on Mr. Watson. A $7,500 civil penalty is assessed against Offshore.[45]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 15th day of May, 2001.

[45] Unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2)(2000).